

STATE OF CALIFORNIA

OFFICE OF ADMINISTRATIVE LAW

**2007 OAL DETERMINATION NO. 23
(OAL FILE # CTU 07-0530-01)**

ENDORSED FILED
IN THE OFFICE OF

2007 NOV 19 AM 11:48

Debra Bowen
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SECRETARY OF STATE

REQUESTED BY: P. Dennis Mattson, Ph.D.

**CONCERNING: DEPARTMENT OF HEALTH CARE SERVICES -TABLES
USED TO DETERMINE ADMINISTRATOR
COMPENSATION.**

**DETERMINATION ISSUED PURSUANT TO
GOVERNMENT CODE SECTION 11340.5.**

SCOPE OF REVIEW

A determination by the Office of Administrative Law (OAL) evaluates whether or not an action or enactment by a state agency complies with California administrative law governing how state agencies adopt regulations. Nothing in this analysis evaluates the advisability or the wisdom of the underlying action or enactment. Our review is limited to the sole issue of whether the challenged rule meets the definition of a "regulation" as defined in Government Code section 11342.600. If a rule meets the definition of a "regulation" but was not adopted pursuant to the Administrative Procedure Act (APA) and should have been, it is an "underground regulation" as defined in the California Code of Regulations, title 1, section 250. OAL has neither the legal authority nor the technical expertise to evaluate the underlying policy issues involved in the subject of this determination.

ISSUE

On May 30, 2007, Dr. P. Dennis Mattson submitted a petition to the Office of Administrative Law (OAL), alleging that the California Department of Health Care Services (DHCS) (formerly the Department of Health Services)¹ employs an underground regulation in violation of Government Code section 11340.5.² The alleged underground regulation is the four Administrator Compensation Tables (Tables) developed by DHCS to determine administrator compensation for Intermediate Care Facilities for the Developmentally Disabled, Habilitative or Nursing (ICF DDH or ICF DDN) funded through the Medi-Cal program. The Tables list ranges of allowable administrator compensation based on geography and facility type and are used to audit the compensation claimed by the facilities.

¹ Health and Safety Code section 100100: "There is in the state government in the California Health and Human Services Agency, a State Department of Health Services which, effective July 1, 2007, is hereby renamed the State Department of Health Care Services...."

² Unless specified otherwise code references are to the California Government Code.

DETERMINATION

OAL determines that the Tables meet the definition of a "regulation" as defined in section 11342.600 and that they should have been adopted pursuant to the APA.

FACTUAL BACKGROUND

Congress established the Medicaid Program in Title XIX of the Social Security Act. The program was designed to provide medical assistance to families that meet income and resources qualifications. In California, this plan has been implemented as the Medi-Cal program.³ Intermediate Care Facilities for the Developmentally Disabled, Habilitative or Nursing (ICF DDH or ICF DDN) are small homes licensed by DHCS and funded through the Medi-Cal program. Each year these homes submit cost reports to DHCS. DHCS audits a statistical sample of these cost reports at random to verify that they contain allowable expenses. DHCS uses the Tables to determine permissible administrator compensation when auditing these homes.

UNDERGROUND REGULATIONS

Section 11340.5, subdivision (a), prohibits state agencies from issuing rules unless the rules comply with the APA. It states as follows:

(a) No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a regulation as defined in [Government Code] Section 11342.600, unless the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to [the APA].

When an agency issues, utilizes, enforces, or attempts to enforce a rule in violation of section 11340.5 it creates an underground regulation. "Underground regulation" is defined in Title 1, California Code of Regulations, section 250, as follows:

"Underground regulation" means any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, including a rule governing a state agency procedure, that is a regulation as defined in Section 11342.600 of the Government Code, but has not been adopted as a regulation and filed with the Secretary of State pursuant to the APA and is not subject to an express statutory exemption from adoption pursuant to the APA.

³ DHCS' Response to Petition Alleging Guidelines to Determine Administrator Compensation Are Underground Regulations, p. 2.

OAL may issue a determination as to whether or not an agency issues, utilizes, enforces, or attempts to enforce a rule that meets the definition of a "regulation" as defined in section 11342.600 and should have been adopted pursuant to the APA. An OAL determination that an agency has issued, utilized, enforced, or attempted to enforce an underground regulation is not enforceable against the agency through any formal administrative means, but it is entitled to "due deference" in any subsequent litigation of the issue pursuant to *Grier v. Kizer* (1990) 219 Cal.App.3d 422, 268 Cal.Rptr. 244.

To determine whether an agency issues, utilizes, enforces, or attempts to enforce an underground regulation in violation of section 11340.5, it must be demonstrated that the agency rule is a regulation not adopted pursuant to the APA and not exempt from the APA.

ANALYSIS

A determination of whether the challenged rule is a "regulation" subject to the APA depends on (1) whether the challenged rule contains a "regulation" within the meaning of section 11342.600, and (2) whether the challenged rule falls within any recognized exemption from APA requirements.

A regulation is defined in section 11342.600 as:

... every rule, regulation, order, or standard of general application or the amendment, supplement, or revision of any rule, regulation, order, or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure.

In *Tidewater Marine Western Inc. v. Victoria Bradshaw* (1996) 14 Cal.4th 557, 571, the California Supreme Court found that:

A regulation subject to the Administrative Procedure Act (APA) (Gov. Code, § 11340 et seq.) has two principal identifying characteristics. First, the agency must intend its rule to apply generally, rather than in a specific case. The rule need not, however, apply universally; a rule applies generally so long as it declares how a certain class of cases will be decided. Second, the rule must implement, interpret, or make specific the law enforced or administered by the agency, or govern the agency's procedure (Gov. Code, § 11342, subd. (g)).

The first element of a regulation is whether the rule applies generally. The Tables in question here apply to all ICF DDHs and ICF DDNs in California that are audited by DHCS. As *Tidewater* pointed out, a rule need not apply to all persons in the state of California. It is sufficient if the rule applies to a clearly defined class of persons or

situations. The Tables apply to such a clearly identified class of persons. The first element is, therefore, met.

The second element is that the rule must implement, interpret or make specific the law enforced or administered by the agency, or govern the agency's procedure. Welfare and Institutions Code section 14105(a) provides clear authority to DHCS to adopt regulations implementing the Medi-Cal Act.⁴ The Tables are used to perform audits necessary to validate Medi-Cal reimbursement. During an audit, the Tables are used to determine whether an ICF DDH's or ICF DDN's administrator compensation claim falls within the established ranges. The Tables are used to set the range of allowable payments to these homes. The Tables are clearly essential to the issue of administrator compensation and Medi-Cal reimbursement and therefore, implement, interpret or make specific the Medi-Cal Act. The second element in the *Tidewater* case is met.

The final issue to examine in determining whether DHCS has created an underground regulation by issuing the Tables is determining if there is an exemption from the APA. Exemptions from the APA can be general exemptions that apply to all state rulemaking agencies.⁵ Exemptions may also be specific to a particular rulemaking agency or a specific program.

OAL notes that Welfare and Institutions Code section 14126.027 allows DHCS to promulgate rules relating to Medi-Cal until July of 2008 through the issuance of provider bulletins or similar instructions.⁶ However, DHCS has not cited this provision to establish an exemption for the Tables, and DHCS has not provided OAL with any evidence that it sent a provider bulletin or similar instructions regarding the Tables.

⁴ Welfare and Institutions Code section 14105 provides: "(a) The director shall prescribe the policies to be followed in the administration of this chapter, [CH. 7. Basic Health Care] may limit the rates of payment for health care services, and shall adopt any rules and regulations as are necessary for carrying out, but are not inconsistent with, the provisions thereof..."

⁵ See Government Code section 11340.9.

⁶ Welfare and Institutions Code section 14126.027 provides: (a) (1) The Director of Health Services, or his or her designee, shall administer this article [Article 3.8. Medi-Cal Long-Term Care Reimbursement Act] .

(2) The regulations and other similar instructions adopted pursuant to this article shall be developed in consultation with representatives of the long-term care industry, organized labor, seniors, and consumers.

(b) (1) The director may adopt regulations as are necessary to implement this article. The adoption, amendment, repeal, or readoption of a regulation authorized by this section is deemed to be necessary for the immediate preservation of the public peace, health and safety, or general welfare, for purposes of Sections 11346.1 and 11349.6 of the Government Code, and the department is hereby exempted from the requirement that it describe specific facts showing the need for immediate action.

(2) The regulations adopted pursuant to this section may include, but need not be limited to, any regulations necessary for any of the following purposes:

(A) The administration of this article, including the specific analytical process for the proper determination of long-term care rates.

(B) The development of any forms necessary to obtain required cost data and other information from facilities subject to the ratesetting methodology.

(C) To provide details, definitions, formulas, and other requirements.

(c) As an alternative to the adoption of regulations pursuant to subdivision (b), and notwithstanding Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code, the director may implement this article, in whole or in part, by means of a provider bulletin or other similar instructions, without taking regulatory action, provided that no such bulletin or other similar instructions shall remain in effect after July 31, 2008. It is the intent that regulations adopted pursuant to subdivision (b) shall be in place on or before July 31, 2008. (Emphasis added)

AGENCY RESPONSE

In its reply to the petition, DHCS argues:

1. The Tables used by DHCS do not meet the definition of a regulation; or alternatively,
2. The adoption of the Tables would be duplicative of current federal regulations and thus are not required to be adopted as regulations.

DHCS, in their first argument, asserts that the Tables are not general rules that apply uniformly to a class. In support of this argument, DHCS cites *Modesto City Schools v. Education Audits Appeal Panel* (2004) 123 Cal.App.4th 1365. In *Modesto City Schools*, the court found that the use of the challenged audit guideline was discretionary and was therefore not a rule of general application. *Modesto City Schools* is distinguishable from the Tables at issue in this determination. The audit guide in *Modesto City Schools* was created in response to a statute which stated, "For each state program compliance requirement included in the audit guide, every audit report shall further state that the **suggested** audit procedures included in the audit guide for that requirement were followed in the making of the audit, if that is the case, or, **if not, what other procedures were followed.**" (Emphasis added) *Ibid*, 1382. This language clearly indicates that the audit guide was not a rule of general application because, by statute, it was merely a suggestion.

In the instant case, there is no such language either in a statute or within the Tables themselves. The DHCS' State Plan Amendment (SPA)⁷ No. 01-022 states,

For purposes of determining reasonable compensation of facility administrators, pursuant to Chapter 9 of the CMS Provider Reimbursement Manual (HIM 15) – reproduced in full at Paragraph 5577 of the CCH Medicare and Medicaid Guide, the State shall conduct its own survey. Based on the data collected from such surveys, the State shall develop compensation range tables for the purpose of evaluating facility administrator compensation during audits of those facilities.

This clearly indicates that the Tables are required to be used in every audit of the facilities.

In its response, DHCS also contends that the auditors have discretion to accept reported costs outside of the ranges listed in the Tables. DHCS argues that this discretion is evidence that the Tables are not a standard of general application and do not meet the definition of a "regulation." As proof of this discretion, DHCS included several

⁷ 42 CFR 400.203: "...State plan or the plan means a comprehensive written commitment by a Medicaid agency, submitted under section 1902(a) of the Act, to administer or supervise the administration of a Medicaid program in accordance with Federal requirements..."

Declarations from DHCS employees. However, rather than establishing that the Tables are not a rule of general application, the Declarations provide further evidence that the Tables are, in fact, a rule of general application.

The Declarations include the following statements:

- "The administrator compensation tables developed by FAB (Financial Audits Branch) are used as guidelines when an auditor goes to a facility to audit a cost report." (Declaration of David Botelho, Exhibit C, p. 4)
- "...the general rule is to evaluate the amount reported for administrator compensation including to determine if it the total reported compensation is within the guidelines in the applicable administrator compensation table." (sic) (Declaration of Michael Alan Harrold, Exhibit D, p. 1)
- "These tables are used by Department auditors in conducting audits of these facilities." (Declaration of Daniel J. Giardinelli, Exhibit E, p. 1)
- "The Administrator Compensation tables are necessary to reasonably determine the amount of allowable compensation that would be allowed...." (Declaration of Gary R. Molohan, Exhibit F, p. 1-2)

These statements establish the application of the Tables as the uniform first step in each audit of administrator compensation.

Several of the Declarations also claim that an exception to the Tables exists in "extraordinary circumstances" (Exhibit D, p. 2) and "extenuating circumstances" (Exhibit E, p. 2). Only one says the auditor has discretion to accept a higher amount (Exhibit C, p. 5). The rest of the Declarations indicate that approval of a higher amount would be required to allow this exception. There is no consensus as to who has approval authority.

These Declarations make it very clear that these Tables *are* rules of general application because the Tables are used in every case to determine the administrator's compensation. An exception is carved out when there are "extraordinary circumstances" and "extenuating circumstances." However, making an exception to the application of a general rule does not make the general rule discretionary.

Furthermore, the use of the Tables closely mirrors *Grier v. Kizer, supra*, 219 Cal.App.3d 422, where the court held that a statistical method used to audit claims for payment of Medi-Cal providers was an implementation of the department's statutory auditing authority that affected Medi-Cal providers statewide. For these reasons, OAL finds that the Tables are a rule of general application and meet the definition of a regulation.

DHCS argues alternatively that the adoption of the Tables would violate the APA standard of nonduplication.⁸ DHCS argues that the methodology and factors are set out

⁸ DHCS also argues that adoption of the Tables as a regulation would "be unduly and unnecessarily duplicative to set out the federal requirements, definitions and standards in a state regulation when these requirements, definitions and standards already exist in federal law...", and would not therefore meet the

in the federal regulations and it would be duplicative to adopt these into the California Code of Regulations. Section 11349.1, subdivision (a)(6) requires that OAL review all regulations for compliance with the nonduplication standard. Section 11349, subdivision (f), provides, in part, as follows:

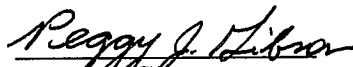
'Nonduplication' means that a regulation does not serve the same purpose as a state or federal statute or another regulation. This standard requires that an agency proposing to amend or adopt a regulation must identify any state or federal statute or regulation which is overlapped or duplicated by the proposed regulation and justify any overlap or duplication. This standard is not intended to prohibit state agencies from printing relevant portions of enabling legislation in regulations when the duplication is necessary to satisfy the clarity standard in paragraph (3) of subdivision (a) of Section 11349.1. This standard is intended to prevent the indiscriminate incorporation of statutory language in a regulation.

If the Tables were in fact duplicative of federal regulations then DHCS would not be required to adopt them as a regulation. Pursuant to *Engelmann v. State Bd. Of Education* (1991) 3 Cal.Rptr.2d 264, regulations governing procedures and criteria do not have to be enacted as regulations if they merely reiterate language in a statute. In the present situation, the federal regulations contain information regarding audits, but the federal regulations do not contain either the Tables or the criteria used to develop the Tables. The Tables, therefore, do not duplicate any federal regulations.

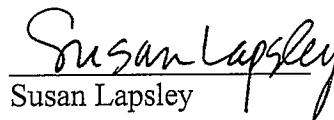
CONCLUSION

The Tables meet the definition of a "regulation" as defined in section 11342.600, and they should have been adopted pursuant to the APA.

Date: November 19, 2007


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necessity standard in section 11349(a). This is not a correct application of the necessity standard pursuant to section 11349(a).